National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 21, 1995

TO: Rochelle Kentov, Regional Director, Region 12

FROM: Barry J. Kearney, Acting Associate General Counsel, Division of Advice

SUBJECT: Bentley's Luggage Corp. Case 12-CA-16658

506-6090-4900, 512-5006-5096, 512-5081-7000, 512-5090-7525, 596-0866-5000, 625-2233-7200, 625-7728-2200

This case was submitted for advice on the following issues:

(1) whether the Employer violated Section 8(a)(1),(3) and (4) of the Act by requiring employees and applicants to sign an agreement requiring employees to submit their employment claims to binding arbitration and pay a portion of the costs before they seek redress from any other forum concerning employment issues or termination;

(2) whether the Employer unlawfully discharged the Charging Party because he refused to sign such an arbitration agreement;

[*FOIA Exemption 5*

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FACTS

The Employer operates a chain of luggage stores nationwide. Its employees nationwide are not represented by any union. In November 1993, Charging Party Allen Robert

Letwin (Letwin) began working for the Employer in its Ft. Lauderdale Galleria Mall store as a regular part-time sales employee.

On June 7, 1994, the Employer imposed a nationwide condition for continued employment, by requiring all current employees to sign an arbitration agreement which provided the following:

By remaining a Bentley's employee, you agree that before filing any legal action regarding your employment or the termination of your employment, the dispute will be submitted to binding arbitration before a neutral third party, pursuant to the procedures of the American Arbitration Association. You also agree that any lawsuit filed, before the arbitration has been conducted should be dismissed....Each party will bear its own costs and attorneys' fees. The arbitrator's fee will be divided equally between the parties.

The Company emphasizes, and the employee hereby acknowledges, that employment with Bentley's is at-will and that neither this application nor any other document should be interpreted as creating a "just cause" standard of employment. The Company and the employee hereby agree that all claims, including claims alleging a contract, tort or violation of any statute, be submitted to

arbitration. If a court decides that this policy is not enforceable for some claims, the employee and the Company agree that claims which are legally subject to this policy should be dismissed by the court.

The agreement appears to be in effect during employees' tenure with the Employer. Further, the agreement states several times

that employment with the Employer is "at will" and termination need not be based on just cause.

Letwin was terminated on July 12, 1994, because he refused to sign the agreement. Prior to his termination, Letwin informed his supervisor, Store Manager Donna Pollio, that he felt that by signing he was giving up all his rights. Pollio agreed that she felt the agreement was "unfair" but insisted that it had to be signed in order for Letwin to keep his position. Letwin discussed his position regarding the arbitration agreement with fellow employees. They told Letwin that they too had problems with signing the agreement but that they could not afford to refuse to sign the agreements and lose their jobs.

On October 11, Letwin filed the instant charge alleging that the Employer violated Section 8(a)(1) and (4) of the Act by terminating him because he refused to sign the arbitration agreement. On January 27, 1995, Letwin filed a first amended charge, which alleged that the Employer's conduct also violated Section 8(a)(3) and sought a remedy for all employees similarly situated to Letwin.[(1)]

On March 29, 1995, Letwin filed a second amended charge which alleged that the June 28, 1994, termination of William Kelly, another employee, for his refusal to sign the arbitration agreement also violated the Act.

The Employer has offered to settle this matter on the following terms: (1) the Employer will send a memorandum to all current employees stating that the arbitration agreement was not meant to prohibit employees from access to the Board; (2) the Employer will insert a clause in the arbitration agreement stating that it was not meant to prohibit employees from access to the Board; (3) the Employer will reinstate Letwin if he signs the modified arbitration agreement; (4) the Employer will pay backpay only for Letwin if he is reinstated; (5) a nonadmission clause.

ACTION

We conclude that the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (4)[(2)] of the Act by maintaining the arbitration agreement and discharging Letwin because he refused to sign the agreement. [*FOIA Exemption 5*

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Initially, we concluded that the Employer violated Section 8(a)(1) and (4) by maintaining the arbitration agreement and insisting that employees sign that agreement as a term and condition of employment. The agreement impermissibly requires employees to waive their statutory right to file charges with the Board.

Section 10(a) of the NLRA provides in relevant part that the Board

is empowered...to prevent any person from engaging in any unfair labor practice...This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.[(3)]

From its inception, the NLRA has permitted the Board to treat individual contracts of employment, when used to frustrate the exercise of statutory rights, as either void or voidable. In National Licorice Co. v. NLRB,[(4)] after the union obtained majority status, the employer refused to grant the union recognition and instead circulated a petition for a bargaining committee. The bargaining committee negotiated individual contracts between the employer and every employee, in which the employees relinquished the right to strike and the right to demand a union-security clause or a written contract with any union. While the contracts granted employees the right to arbitration as to wages and hours, they expressly foreclosed arbitration as to discharge. The Supreme Court found that the individual employment contract imposed illegal conditions on the exercise of Section 7 and 8 rights. The effect of the clause barring arbitration of discharge was to "discourage, if not forbid," the presentation of grievances, by discharged employees to the employer through a union, or in any way except personally.[(5)]

Consistent with National Licorice, the Board has regularly held that an employer violates the Act when it insists that an employee waive his statutory right to file charges with the Board or to invoke his contractual grievance-arbitration procedure.

(6) A union similarly violates Section 8(b)(1)(A) when it conditions use of the union's hiring hall on the signing of a form containing a waiver of an employee's right to sue the union because of an employment dispute.(7)

The arbitration agreement involved in this case has precisely the same unlawful effect as these waiver demands or agreements long condemned by the Board. The arbitration agreement requires, as a condition of employment, that the employee subordinate his/her right to file charges with the Board concerning employment to the Employer's unilaterally chosen arbitration process. Hence, a Section 8(a)(4) and (1) complaint is warranted, absent settlement, as to the Employer's maintenance of the arbitration agreement as a term and condition of employment and its discharge of Letwin for refusing to sign the agreement.

We note that the complaint in Kinder-Care, supra, alleged only a Section 8(a)(1) violation, not an additional Section 8(a)(4) violation. However, the rule in Kinder-Care, which stated that employees had to bring their employment-related disputes to the employer "immediately,"(8) did not explicitly bar employees from asserting their statutory rights, even though the Board construed the rule as having such an effect. On the other hand, in Great Lakes Chemical Corp., supra, where employees were required to sign a statement waiving their rights to bring any legal action against the employer as a result of their layoff or termination, the Board affirmed the conclusion of the ALJ, at 622, that the employer violated Section 8(a)(4), as well as Section 8(a)(1), by conditioning employment on the signing of the waiver. Like the waiver demand in Great Lakes Chemical, supra, the arbitration agreement in this case explicitly requires an employee not to assert his statutory rights, and even to withdraw any legal actions instituted pursuant to those statutory rights, before using the Employer's compulsory arbitration procedure. The rule thus deters employees from seeking to file charges with the Board, because the rule requires those employees to resort to the Employer's arbitration procedure before filing charges or otherwise seeking to vindicate their employment rights. Such an open attack on an employee's right to seek access to the Board is appropriately litigated through a Section 8(a)(4) allegation.(9) Hence, a Section 8(a)(4) complaint is warranted even though Letwin was discharged for refusing to sign the arbitration agreement, not for filing a charge with the Board.

The Employer contends that this agreement is lawful under Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 1655 (1991). In that case, Gilmer, a 62-year-old stockbroker employed by Interstate/Johnson Lane Corp., had been required as a condition of registration as a securities representative with the New York Stock Exchange to agree to arbitrate any dispute arising out of his employment or termination from employment. When Gilmer filed an ADEA charge with the EEOC following his termination, the employer sought to compel arbitration of the claim pursuant to the agreement. The Court held that the agreement was enforceable against Gilmer. Gilmer argued that the Federal Arbitration Act, 9 U.S.C. Sec. 1, (FAA) barred mandatory arbitration of "contracts of employment," because it stated that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Court held that it was "inappropriate" to discuss the scope of this exclusion because "the arbitration clause being enforced here is not contained in a contract of employment."(10) Instead, the arbitration agreement was part of Gilmer's registration with the New York Stock Exchange, and there was no claim or evidence that Gilmer and his employer were parties to an employment agreement that contained a written arbitration clause. Therefore, the Court specifically left "for another day" the meaning of Section 1 of the FAA.(11)

The Court further noted that it found no evidence that Gilmer, an experienced businessman, "was coerced or defrauded into agreeing to the arbitration clause in his registration application."(12) The Court rejected the argument that there was inequality of bargaining power between Gilmer and his employer and noted that such mere inequality is not "a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."(13) Instead, it held that such claims should be addressed in specific cases.(14) The Court also noted, at 1653, that an individual employee subject to an arbitration agreement could nonetheless file an ADEA charge with the EEOC, as Gilmer had done. The Court further noted, ibid., that the EEOC had the authority to investigate age discrimination problems even in the absence of a charge alleging a violation.

We conclude that Gilmer is not applicable in this case. In Gilmer, the Court stated that while not all statutory claims may not be appropriate for arbitration, the person entering into such an agreement must be held to the agreement, "unless Congress evidenced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."(15) As noted above at page 4, Section 10(a) of the Act gives the Board authority to prevent or remedy unfair labor practices, regardless of any other dispute

resolution mechanism that may be available. The Board's decision to defer to contractually-negotiated grievance-arbitration between an employer and a union is thus an exercise of the Board's discretionary authority and the antithesis of the purpose of the Employer's attempt here to preclude the Board from exercising its jurisdiction in any manner.

Moreover, the Court in Gilmer was merely enforcing an arbitration agreement that Gilmer had previously signed; it did not have to confront the question raised by this case, that is, whether the signing of an arbitration agreement that also constitutes a waiver of an employee's statutory rights is a lawful term and condition of employment. Thus, Gilmer does not overrule the Board's position, as set forth in the cases listed in fn. 8, supra, that efforts to secure such waivers from employees are unlawful. (16) We further note that while the EEOC can investigate age discrimination questions and problems on its own initiative, even in the absence of a charge, the Board requires the filing of a charge to initiate its processes; thus, any attempt by an employer to bar an employee from filing an unfair labor practice charge would foreclose the Board from exercising its statutory jurisdiction.

We further conclude that the Employer's arbitration plan is not comparable to or an adequate substitute for the Board's processes. The Act permits the employee to claim that his termination violated his statutory rights. The arbitration agreement, on the other hand, is essentially illusory because the Employer states that its employees are "at will" and no just cause is required to terminate an employee. (17) Thus, this agreement does not give an employee a basis upon which to claim that a termination is improper.

The Employer also contends that the arbitration agreement does not bar the processing of an unfair labor practice charge. The clear language of the agreement is contra. Thus, the agreement specifically states that an asserted "violation of any statute" must be submitted to arbitration. Moreover, the Board affirmed an ALJ's rejection of a similar argument in Construction and General Laborers, Local 304, supra, at 607, noting that the fact that the agreement barred suits as to any matter meant that it was intended to bar unfair labor practice charges, even though the Board was not named in the agreement. Indeed, the Board has construed even vaguer language as requiring employees to waive their statutory rights to file charges. Thus, in Kinder-Care Learning Centers, supra, the employee handbook maintained a "parent communication rule" that stated that it was "essential" that employees bring their employment-related complaints to the employer "immediately" or use the company's problem-solving procedure; the penalty for failure to follow this procedure was discharge. The employer required employees to sign copies of this "parent communication rule," acknowledging that they had received a notice of the rule. The Board specifically found, at 1172, that the ALJ "erred" in failing to find that this rule unlawfully interfered with employees' statutory rights to bring their complaints to persons and entities other than the company, "including a union or the Board" even though the rule did not "on its face prohibit employees" from such actions. The Board further concluded, that the rule was unlawful because it "conflicts directly with the statutory policy of facilitating the ability of employees to organize and bargain collectively" and "tends to inhibit employees from banding together...." Ibid. (18) Therefore, the employer also violated the Act by requiring employees to sign a copy of the rule, thus acknowledging their adherence to the rule. Id. at 1178.

The Employer also argues that the arbitration agreement merely requires an employee to use the Employer's arbitration procedure before filing charges and that it does not bar the employee from filing charges before the Board. Although the arbitration clause merely provided that employees must "first" seek redress of their claims through arbitration, theoretically permitting employees to exercise their statutory rights once the arbitration is concluded, such redress would be largely meaningless given the six-month statute of limitations in the NLRA and the time delays in getting cases decided by an arbitrator. Further, since the arbitration agreement specifically provides that employees must seek dismissal of any actions pending in other forums, the Employer has effectively thwarted any attempt to utilize a deferral or abeyance system in some other forum. Such language is a strong indication that the Employer's purpose in proposing this language was to preclude employees' access to alternative forums.

Gilmer's reliance on the plaintiff's education and extensive business experience as evidence that he was not likely to be a victim of inequality of bargaining power between an individual and his employer is also inapposite in considering the merits of an unfair labor practice charge. Section 2(3)of the Act does not define protected employees in terms of education, experience or sophistication. Moreover, the Act specifically protects professional employees, including highly educated ones, as defined in Section 2(12). (19)

For all of the above reasons, we conclude that the Employer violated Section 8(a)(4) and (1) by insisting that, as a term and condition of employment, employees agree to waive their statutory rights to file charges with the Board.

It follows that the Employer violated Section 8(a)(4) and (1) when it discharged Letwin because of his refusal to sign the agreement.

[*FOIA Exemption 5*

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For all of the above reasons, a Section 8(a)(4) and (1) charge should issue, absent settlement.[(20)]2

B.J.K.

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[1] Letwin has also filed a charge with the EEOC, alleging that his termination violated the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 et seq., and a civil suit under Florida law. These proceedings are pending.

[2] The Section 8(a)(3) allegation should be dismissed, absent withdrawal. There is no evidence of any union activity on Letwin's part and any remedy which would be available under Section 8 (a)(3) would also be available under Section 8(a)(1).

[3] The House Conference Report No. 510 on H.R. 3020 (the Taft-Hartley Act) reads:

The Senate amendment [to Section 10(a)], because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions usable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's power shall not be affected by any other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. 1 Legislative History of the Labor Management Relations Act of 1947, p.556.

[4] 309 U.S. 350 (1940).

[5] Id. at 360. See also J.I. Case v. NLRB, 321 U.S. 332, 337 (1944), where the Supreme Court held that individual employment contracts were not a bar to the selection of a collective-bargaining representative, noting, "Wherever private contracts conflict with [the Act's] functions, they must obviously yield or the Act would be reduced to a futility."

[6] See, e.g., Kolman/Athey Division of Athey Products Corporation, 303 NLRB 92 (1991); Kinder-Care Learning Centers, 299 NLRB 1171 (1990); Great Lakes Chemical Corp., 298 NLRB 615, 622 (1990); Retlaw Broadcasting Co., 310 NLRB 984 (1993).

[7] Construction and General Laborers, Local 304 (AGC of California), 265 NLRB 602 (1982).

[8] 299 NLRB at 1171.

[9] Congress enacted Section 8(a)(4) to ensure that all persons would be "free from coercion against reporting [possible unfair labor practices] to the Board." Nash v. Florida Industrial Commission, 389 U.S. 235, 238 (1967).

[10] Id. at 1651-52, fn. 2.

[11] Ibid.

[12] 111 S.Ct. at 1655-56 (such claims will be resolved based on the facts of specific cases).

[13] Id. at 1655.

[14] Id. at 1656.

[15] Id. at 1652, quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[16] See also EEOC v. River Oaks Imaging and Diagnostic, 67 FEP Cases 1243 (SD TX. 1995), in which a federal court enjoined the employer from insisting that employees agree to

an ADR (alternative dispute resolution) policy that would preclude or interfere with the employees' rights to file charges with the EEOC or file suits under Title VII, and would require employees to pay the costs of the ADR proceeding. The employer was also enjoined from retaliating against employees who filed complaints with the EEOC or opposed the employer's mandatory ADR policy. The EEOC and the employer subsequently agreed to a consent order consistent with the above injunction. The question of the lawfulness of the discharges of several employees was reserved for a trial de novo. See Daily Labor Reporter, July 3, 1995, at A-2. Neither the original injunction nor the consent order mention Gilmer.

The EEOC has since issued a policy statement stressing that any participation in ADR proceedings under the EEOC's auspices must be voluntary because "the unique importance of the laws against employment discrimination requires that a federal forum always be available to an aggrieved individual." "EEOC Policy Statement on Alternative Dispute Resolution," Number 915.002, Daily Labor Reporter, July 18, 1995, at E-13.

[17] See, e.g., A-1 King Size Sandwiches, Inc., 265 NLRB 850, 860 fn. 20 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1034, finding a grievance-arbitration provision "essentially illusory" because it did not apply to a sweeping list of management rights, including the right to discipline and discharge employees.

[18] See also Central Security Services, 315 NLRB 239, 243, 253-54 (1994).

[19] Compare OPEIU Local 2, 268 NLRB 1353, 1356 (1984), enf'd sub nom. Eichelberger v. NLRB, 765 F.2d 851 (9th Cir. 1985), where, in find that a union did not breach its duty of fair representation in handling a grievance filed by an employee of the union, noted that the employee was thoroughly familiar with her contract rights, including the right to file a grievance without the union's participation, and had previously demonstrated an ability to exercise those rights.

22 [*FOIA Exemption 5*].